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MMP COMMUNICATIONS SDN BHD

v.

FLYFIREFLY SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: 22NCC-1879-11-2011]
10 OCTOBER 2012

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CONTRACT: *Formation - Concluded contract - Parties collaborated to publish magazine subject to execution of formal contract - Collaboration terminated after several issues of magazine published - Whether parties knew at outset that neither could claim against the other if collaboration was terminated any time before execution of formal contract - Whether*

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allowing claim tantamount to court writing contract for parties - Whether claim for damages proven

This case concerned whether a concluded contract had come into being between the parties. The plaintiff publishers entered into an

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arrangement with the defendant, an airline, to publish a magazine which could be used as an in-flight reading material on the defendant's aircrafts. The defendant's letter appointing the plaintiff as the publisher of the magazine however expressly stated that the appointment was "subject to the execution of an agreement

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specifying the terms of the appointment". A draft business cooperation agreement ('BCA') was prepared and while the parties were still negotiating on the material terms of the agreement, the plaintiff went ahead to publish 15 monthly issues of the magazine before the defendant terminated the arrangement for failure of the

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parties to agree on the terms of a formal agreement to be executed. The defendant thereafter dissociated itself from the magazine but the plaintiff continued with its publication and distribution as a stand-alone magazine available at book stores and news stands. The plaintiff filed the instant claim against the

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defendant for RM3.2m comprising the costs it had incurred in putting out the magazine including printing costs, editorial staff salaries and allowances and consultancy fees and costs of sales, marketing, promotion and distribution. The defendant, in denying the claim, *inter alia*, averred that the plaintiff had all along

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proceeded on the basis the magazine was a stand-alone one and was not airline-specific or meant solely to be the defendant's in-flight magazine.

Held (dismissing claim with costs):

(1) The parties knew the terms upon which they were proceeding on if an agreement could not be signed. Either party could call it off and neither party would have a claim against the other. (para 39)

(2) The magazine was for all intents and purposes a stand-alone magazine of the plaintiff featuring the defendant in a limited tie-back fashion and the defendant was essentially the synergistic distribution channel. The plaintiff was prepared to proceed with the publication knowing full well it could be proceeded with or without the defendant's association or at least the plaintiff was prepared to take that risk. Both parties knew that the losses shall lie where they fell if there was no concluded BCA at the end of the day. (para 39)

(3) To allow the plaintiff to sue based on the unsigned BCA would be tantamount to the court interfering in the negotiation of the parties to the contract and effectively signing the agreement for the defendant when it could not agree to the terms. That would be setting a dangerous precedent. (paras 41 & 42)

(4) The plaintiff had not proved its claim on a balance of probabilities. (para 52)

Case(s) referred to:

AG of Hong Kong & Anor v. Humphreys Estate (Queen's Gardens) Ltd [1987] 1 AC 114 ***(refd)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Bonham-Carter v. Hyde Park Hotel Ltd [1948] 64 TLR 177 ***(refd)***

Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 CLJ 1 SC ***(refd)***

Lee Sau Kong v. Leow Cheng Chiang [1960] 1 LNS 56 HC ***(refd)***

Low Kar Yit v. Mohamed Isa [1963] 1 LNS 158 ***(refd)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor [1996] 2 CLJ 586 FC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd [2002] 5 CLJ 391 HC ***(refd)***

Regalian Properties Plc v. London Dockland Development Corporation [1995] 1 All ER 1005 ***(refd)***

A *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC* ***(refd)***
Thomson Plaza Pte Ltd v. Liquidators of Yaohan Department Store Singapore Pte Ltd [2001] 3 SLR 437 ***(refd)***

For the plaintiff - Koh Yew Chong (Justin Leong with him); M/s Albar &
B *Partners*
For the defendant - Saranjit Singh (Nur Faezah Mas'od with him); M/s Saranjit Singh

Reported by Ashok Kumar

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JUDGMENT

Lee Swee Seng JC:

D **Prologue**

[1] The dispute between the parties here are not unfamiliar in the business world. While negotiations on terms of a contract are on going, parties have started on the project; performing what
E each seems to think are the terms of what sometimes is called a collaborative arrangement. Problems would arise when parties cannot agree on the formal contract to be signed. Is it then a case where the terms are still in a flux with both parties agreeing to go with the flow until the terms are being firmed up and
F finalised in a formal contract to be executed by the parties? Whilst it is easy to say that substance would take precedence over form, often parties cannot agree as to whether a collaborative arrangement has metamorphosed and matured into a concluded agreement. Assuming it has, what then are the obligations of the
G parties where a breach of these entitles a party to sue the other.

Problem

[2] The plaintiff here is in the publication business. It managed to interest the defendant, an airline in what started off as a stand-
H alone magazine for distribution in-flight in all the defendant's aircraft. There was a limited tie-back to the defendant, who is a wholly-owned subsidiary of Malaysian Airline System Berhad. The rudimentary terms of the collaborative arrangement was put into effect with the publication of the first issue of Kunang-Kunang in
I January 2010. It went on for some 14 publications after that until

the collaborative arrangement was terminated by the defendant in March 2011 for failure of the parties to agree on the terms of the agreement to be executed. The name "Kunang-Kunang" is the Malay word for firefly.

[3] I detected a bit of gung-hoism on the part of the plaintiff who was only too keen to commence publication even before a formal agreement has been executed by the parties. The letter of appointment is marked exh. P1 which is the defendant's letter of 8 October 2008 to the plaintiff. It was for the appointment of the plaintiff as the publisher of the Firefly In-Flight magazine "Kunang-Kunang" ("K2"). It was stated that "this appointment shall be further subject to the execution of an agreement specifying the terms of this appointment".

[4] The first draft of a Business Cooperation Agreement ("BCA") was taken out in mid-2009. The draft terms were being discussed with respect to the parties collaborating with each other in the production, publication and distribution of K2. There were various discussions and negotiations on the terms of the collaboration from 2009 through March 2011. The parties could not agree on the terms of the BCA and especially on the concept and DNA of the magazine, the financials and the trademarks and intellectual property rights of the magazine. Matters came to a head leading to the defendant giving the plaintiff a final drop-dead date of 4 March 2011 such that if the parties still could not agree on the terms of the BCA then the negotiations would be terminated and with that the publication of the magazine.

[5] As the key terms could not be agreed the defendant ceased to be associated with K2 effective 4 March 2011. The draft BCA remained a draft and no BCA was signed. Thereafter the plaintiff continued with the production, publication and distribution of K2 until today.

Prayers

[6] The plaintiff claimed against the defendant for the sum of RM3,158,818 as at 31 July 2011 together with interest at 4% per annum from the date of writ to date of realisation and costs. The breakdown of the said sum is set out at para. 10 of the statement of claim at pp. 11-13 of the bundle of pleading marked as bundle A. The amount is derived at by taking into account all the direct costs of the magazine including printing costs, salaries and other

allowances of the editorial staff and consultancy fees incurred and travelling expenses as well. There were also the indirect costs of sales, marketing, promotion and distribution costs as well as staff training and HR, finance and administrative costs.

[7] The defendant denied that the negotiations had led to a concluded BCA or that a contract had been consummated upon which the defendant could be sued based on the draft terms of the BCA. The defendant maintained that the plaintiff was at all material times aware that the appointment of the plaintiff as the publisher of K2 was "subject to the execution of an agreement specifying the terms of the appointment". The defendant further averred that the plaintiff had wanted and indeed had proceeded on the basis that K2 was a stand-alone magazine and not the defendant's in-flight magazine or a single purpose airline specific magazine but in essence a magazine that merely associated itself in a limited aspect with the defendant. The defendant also averred that K2 was a magazine that was put on board the defendant's flights and was sold independently in the market on the rack at selected book stores to the public at large.

[8] At any rate the defendant denied that the plaintiff was entitled in law or otherwise to claim for all the alleged costs incurred by the plaintiff in the production of the K2 from January 2010 to July 2011 and the alleged costs connected to the advertisements. The defendant stated that from its publication in January 2010 to April 2010, K2 was placed in the defendant's aircraft as a complimentary magazine to passengers on board. Thereafter, passengers who were interested could purchase the magazine from the defendant. The passengers who were interested could purchase the magazine from the defendant and the plaintiff would issue monthly invoices for the sale of the magazine and the revenue generated from the sale of these magazines were entirely credited and paid over to the plaintiff by the defendant.

[9] The defendant also averred that it had contributed in generating revenue for the magazine by obtaining advertisements for the plaintiff from its business partners. However the profits derived from the magazine were never directed to the defendant. The defendant asserted that to allow the plaintiff its claim as particularised in para. 10 of its statement of claim would be to allow the plaintiff to reap the benefit of its publication in toto and lay the burden of the expense and cost onto the defendant who has not derived any financial or tangible benefit from the publication and sale of K2 magazine.

[10] The defendant further took the stand that it was out of costs and expenses to facilitate and assist the plaintiff in the logistical aspect and accommodation in connection with the publication and distribution of the magazine on the defendant's aircraft. It said that placing the magazines on the defendant's aircraft was equated to taking up advertisement space which in normal circumstances, is charged to the publisher of the magazine as it is also a source of income for the defendant. However, the costs for insertion in the seat pocket of the aircraft from January 2010 until March 2011 were not charged to the plaintiff as it was part of the risks taken by the defendant in the proposed collaboration. It alluded to the fact that it was to the plaintiff's benefit as it had enlarged and widened the target readers of K2.

Principles

The Meaning Of "Subject To The Execution Of An Agreement" In The Context Of The Collaborative Arrangement Between The Parties

[11] There is no doubt that exh. P1 is the genesis of the commencement of the collaborative arrangement between the parties. It states that the appointment of the plaintiff as the publisher of the Firefly In-Flight Magazine K2 shall be "further subject to the execution of an agreement specifying the terms of this appointment". In other words, parties are still at a negotiation stage where the terms of the appointment had not been firmed up and finalised.

[12] The said letter dated 8 October 2008 was signed by Ms Angelina Fernandez (DW3) as the Head of Communications of the defendant. The appointment was accepted by Datuk Jamaluddin Mansor (PW2), a director and the CEO of the plaintiff.

[13] Certain phrases in law and commerce have through their ubiquitous usage attained a universal and indeed uniform meaning. The phrase "subject to contract" or "subject to the execution of an agreement" is one such phrase. A good place to begin the tracing of the salutary status of this expression is the case of *Low Kar Yit v. Mohamed Isa* [1963] 1 LNS 158; [1963] MLJ 161. There the issue for determination was on the meaning of a formal contract that was to be drawn up and agreed upon. His Lordship Gill J (as he then was) expounded with eloquence the enigma of the expression "subject to contract" as follows at p. 173:

A The authorities would appear to support the view that even where there is nothing in the agreement to suggest that the parties contemplate that the subsequent contract shall contain any new or different terms, nevertheless *if it appears that the parties do not intend to bind themselves contractually by the agreement but only by the subsequent contract if and when they should enter into it, there will be no contract*. Moreover, if the reference to the execution of the subsequent contract is in words which according to their natural construction import a condition, this will almost invariably be conclusive that the agreement itself was not intended to be a contract. To my mind this was true of this case. *It will bear repetition if I say that when the actual phrase "subject to contract" is used, the courts tend to give effect to those words unless there is strong evidence to the contrary. The result is that the agreement which is made "subject to contract" is of no legal effect. Perhaps I should add that the plaintiffs in this case are asking the court to order the defendants to execute the draft agreement agreed upon, which amounts in effect to asking the court to enforce an agreement to enter into an agreement*. That is an order which the court clearly has no power to make in the circumstances of the case.

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It is no part of my duty to pronounce whether or not the conduct of any of the parties concerned in this matter is open to censure. All I have to do is to determine whether there is or is not a concluded contract between the plaintiffs and the defendants which the plaintiffs can enforce. (emphasis added)

[14] In *Thomson Plaza Pte Ltd v. Liquidators of Yaohan Department Store Singapore Pte Ltd* [2001] 3 SLR 437, His Lordship GP Selvam J (as he then was) in applying *Low Kai Yit*'s case (*supra*) observed as follows at p. 445:

G … The law with regard to a commercial contract between hardnosed businessmen is that, save in extreme cases, the court must not rewrite what the parties have agreed simply by relying on the court's notions of unreasonable or unconscionable conduct. To do so would undermine certainty and security in the law of contract.

27 Authorities abound to establish this principle. Save exceptions excepted, *the expression 'subject to contract' means that unless and until a formal written contract has been executed and exchanged by the parties there is no binding and enforceable contract between them. That is so even if the parties are in agreement as to all the terms.*

> 28 Parties who contract on the basis of 'subject to contract' do so because they want an escape route in case they wish to call the transaction off. They do not consider it a wrong way of business. It is a last chance escape route in case they find it impossible or undesirable to fulfil the contract. (emphasis added)

[15] In *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 CLJ 1 at p. 6; [1994] 1 MLJ 108 at pp. 116-117, His Lordship Peh Swee Chin SCJ spoke of the fact that:

> *It is settled that the formula of 'subject to contract' gives rise to a strong presumption of a necessity of a further formal contract*, 'formal' be it noted, is not to be understood in the common parlance as being just a 'mere formality' of no importance. As Sir Garfield Barwick who delivered the opinion in *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Anor* [1981] 1 MLJ 56 said [at p. 58]: 'But, in general, employment of the formula "subject to contract" as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations'. We did not think it necessary to set out here a great number of past cases to illustrate such similar effect, and we think that just mentioning one of the more recent cases in addition to the case of *Winn v. Bull* [1877] 7 Ch D 29, will suffice; that extra case is *Derby & Co Ltd v. ITC Pension Trust Ltd & Anor* [1977] 2 All ER 890. From the host of such past cases, the principle is clear, it requires cogent evidence to displace this strong presumption. (emphasis added)

[16] Could the parties by conduct and with the passage of time, have waived the requirement of a formal contract being executed? I do not find that there was any waiver for the parties had numerous drafts and trekking of changes, culminating in a final deadline for the execution of the BCA. It was held in *Muniandy a/l Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor* [1996] 2 CLJ 586; [1996] 1 MLJ 374 that any waiver must be intentional and with knowledge that it relates to the conditions "subject to contract".

The Position Of The Parties In That Publication Had Commenced Without An Agreement Being Executed

[17] It is not uncommon in business, for a party keen on securing and cementing a contract to strategise by anchoring itself into a relationship by establishing a foothold in the contemplated business. It is to use a marketing term, posturing and positioning oneself for power negotiation. Such a stance while it may be good from the point of strategy, is not without its attendant risk.

[18] In other words, no amount of obtrusive optimism with the hope of overcoming whatever obstacles that may be encountered in the negotiations can take away the option of the other party in nor wanting to agree to the terms proposed. Parties who take the plunge whilst posturing and positioning for a piece of the business, do so at their own peril.

[19] The following three cases capture the reality of the risk involved when one or both parties proceeded to perform a contract which terms have not been finalised.

[20] In *Regalian Properties Plc v. London Dockland Development Corporation* [1995] 1 All ER 1005, at p. 1024, Rattee J observed as follows:

> ...Each party to such negotiations must be taken to know (as in my judgment Regalian did in the present case) that pending the conclusion of a binding contract any cost incurred by him in preparation for the intended contract will be incurred at his own risk in the sense that he will have no recompense for those costs if no contract results. In other words, I accept in substance the submission made by Mr Naughton QC, counsel for LDDC, to the effect that, *by deliberate use of the words 'subject to contract' with the admitted intention that they should have their usual effect, LDDC and Regalian each accepted that in the event of no contract being entered into, any resultant loss should lie where if fell.* (emphasis added)

[21] In *AG of Hong Kong & Anor v. Humphreys Estate (Queen's Gardens) Ltd* [1987] 1 AC 114 at pp. 124-125, Lord Templeman analysed the position of the parties as follows:

> ... But in order to found an estoppel the government must go further. First the government must show that HKL created or encouraged a belief or expectation on the part of the government that HKL would not withdraw from the agreement in principle. Secondly the government must show that the government relied on that belief or expectation. Their Lordships agree with the courts of Hong Kong that the government fail on both counts.
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> ...
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> Their Lordship accept that there is no doubt that the government acted in the confident and not unreasonable hope that the agreement in principle would come into effect. As time passed and more and more actions were undertaken in conformity with the proposals contained in the agreement in principle, the government's hopes were strengthened. *It became more and more unlikely that either the government or HKL would have a change of*

heart and would withdraw from the agreement in principle. But at no time did HKL indicate expressly or by implication that they had surrendered their right to change their mind and to withdraw. That right, expressly reserved and conferred by the government, was to withdraw at any time before "document or documents necessary to give legal effect to this transaction are executed and registered. "HKL did not encourage or allow a belief or expectation on the part of the government that HKL would not withdraw, HKL proceeded in accordance with the proposals contained in the agreement in principle but at the same time they continued to negotiate the exact provisions of the documents which were necessary to be executed before the parties could become bound.

There were significant events which indicated plainly that HKL, to the knowledge of the government, retained the right to withdraw from the agreement in principle. (emphasis added)

[22] In *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 at pp. 142-143; [1994] 2 MLJ 754 at pp. 767-768, His Lordship Edgar Joseph Jr, SCJ, delicately delineate the position of the parties as follows:

... In our view, having regard to the **several essential matters which still remained to be settled between the parties** to which we have referred and the letter of 19 September 1984 with its vital qualifying clause, 'subject to the following terms and conditions', one of which was condition (vi) aforesaid, the present case falls within the principle enunciated by Sir George Jessel MR in *Crossley v. Maycock*...

We would add that we have not overlooked the fact that the Plaintiff had, after the receipt of the letter of 19 September 1984, conducted itself as if it considered that a contract binding in law had been concluded, as evidenced by the steps it had taken in that direction to which we have referred. However, this does not really assist in deciding the question of construction of the letter of 19 September 1984 for reasons we now give.

Looking back, our analysis of the factual matrix in the present appeal is that both the *plaintiff and the defendant were optimistic about a formal contract being executed pursuant to the letter of 19 September 1984 and, so, to expedite performance under that contract, the plaintiff, with the knowledge, though not necessarily at the request of the defendant, had commenced the preliminary works hereinbefore mentioned.* (emphasis added)

[23] The period of the publication of the K2 magazines from January 2010 to March 2011 of 15 issues reflected some collaborative arrangements that parties had entered into. The maiden issue of January 2010 set out the names of the "Firefly Editorial Team" after the names of the plaintiff's editorial personnel. The plaintiff's editorial personnel consisted of the editor in chief, Datuk Jamaluddin Mansor (PW2), the editor Hafidah Samat, the assistant editor Raja Azuni Raja Aziz (PW3) and the names of the photojournalist and writers. The names of the defendant's editorial team are editor Angelina C Fernandez (DW3), assistant editors Alita Suraya and Natalya Evon Matthew (DW2). It was stated as "JOINTLY PUBLISHED" by the plaintiff and the defendant.

[24] In the subsequent issues, the words "JOINTLY PUBLISHED" had been dropped and in its place the words "IN COLLABORATION WITH".

[25] It was a stand-alone magazine with a limited tie-back to the defendant. Initially the magazine had featured the defendant in no more than six to seven pages of advertisements, advertorials and airline information. However, according to DW3, Angelina Fernandez, that dwindled to around three to four pages from March to April 2010. She discerned a palpable shift from the initial collaborative genre of travel, and leisure to more of an entertainment based magazine having an accent on local artists. She communicated her displeasure on behalf of the defendant to the plaintiff. This can be found in the contact report prepared by the plaintiff at pp. 451 to 454 of bundle H.

[26] I agree with DW3's testimony that though there had not been any formalised and finalised agreement in the negotiated BCA, the plaintiff was keen to commence publication of K2. As for the defendant, I accept the evidence of DW3 that the plaintiff was not averse to the risk of commencing publication simply because K2 was not an airline specific magazine and that it was to be distributed and sold to the public through bookstores and news stands.

[27] The defendant also bore some risks by underwriting the travel and logistical expenses of the plaintiff. The defendant also absorbed the advertisement expenses that would ordinarily be charged to users for having the 'eyeball' position of the magazines in the seats docket of its aircraft. There were also advertisements

solicited by the defendant from its business partners. Revenue from the sale of the magazine to in-flight passengers were channelled for the benefit of the plaintiff. The plaintiff got to keep for themselves all the revenue from its own sale of the magazine to the public.

[28] Whilst the plaintiff's witnesses would have the court believe that this collaborative arrangement benefitted the defendant more than the plaintiff and whilst the defendant painted the exact opposite picture, this court would take the view that the collaboration benefitted both the parties to some extent.

[29] The plaintiff had a kick-start for its publication and the considerable 'mileage' with the 'eyeball' exposure in all the aircraft of the defendant. The plaintiff could further market the magazines to its target audience. Indeed after the collaboration ended in March 2011, the plaintiff continued with the monthly publication of the magazine on a stand alone basis to this day.

[30] The defendant benefitted from having a magazine promoting its airline, routes, destinations and the like without having to bear the publication costs.

[31] However if one were to ask further, what are the other terms not agreed upon which agreement is vital for the cementing of the business collaboration agreement, one gets into problem. The more vague and volatile the terms are, the further the arrangement is from an agreement. It was obvious that the parties were still negotiating and could not agree on some core clauses.

[32] There were issues of the defendant's obligations with respect with respect to soliciting advertisements and sponsorship of a minimum sum and number of pages for each issue and to be liable for the shortfall. There was the issue of profit sharing with the defendant which was nil for the first year and 5% for the second year and increasing 5% every year until the fifth year at 20% and from the sixth to the eighth year the percentage would be subject to review. Then as late as 28 February 2011 Datuk Jamaluddin Mansor the CEO of the plaintiff had forwarded an email to the defendant on the change of direction from "Travel and Leisure" to "Lifestyle" and that further the magazine would now be complimentary with the revenue solely derived from advertisements. There was thus the new element of the expectation on the part of

the defendant to generate advertisement sales for K2 magazine. There was also the proposal by the defendant that the duration of the agreement should be for five years instead of eight years.

[33] There was also the knotty issue of trademarks and copyright and other intellectual property rights; "Kunang-Kunang" being the Malay word for firefly and the need to address those issues both with respect to the rights of the parties while the agreement is subsisting and after the termination. When the defendant requested for the DNA or concept of the magazine as a whole the plaintiff retorted that it would only be provided after the execution of the BCA!

[34] There was the sticky issue of compensation and the circumstances and consequences of termination for breach or by notice by either party or by mutual consent.

[35] Various emails were exchanged between the parties and various meetings held but the end result was that there was no finalised agreement arrived at after the drop-date of 4 March 2011. After that there was another email dated 15 March 2011 from Dato' Eddy Leong, the then CEO of the defendant reiterating as follows:

> As far as I'm concerned, this discussion lapsed on 4 March 2011. We will not be pursuing the matter further.

[36] Whilst it may be the defendant's internal audit requirement that there cannot be substantial costs expended without a formalised written agreement, I would say that it was perfectly legitimate and legal for the defendant to tell the plaintiff that parties cannot carry on with the collaborative arrangement indefinitely without the terms being agreed upon. If the terms cannot be agreed upon then parties are perfectly entitled to terminate the business relationship.

[37] It cuts both ways. In as much as the defendant can put an end to the arrangement and walk away, the plaintiff too can do the same and the defendant would have no cause for complaint. Once the arrangement had been terminated, the K2 magazine was no longer placed in the defendant's aircraft and the plaintiff was free to re-strategise with respect to reaching out to its target audience as a stand-alone magazine which magazine it has been from the beginning and this time with no tie-back with the defendant whatsoever.

[38] Learned counsel for the plaintiff, Mr Koh Yew Chong, had referred me to the *dicta* of His Lordship Abdul Malik Ishak J (as he then was) in *Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd* [2002] 5 CLJ 391 at pp. 433-434:

Executed Contract

The distinction between the status of an executory contract and an executed contract has been demonstrated by me elsewhere in other judgments. For this exercise, it would be ideal to refer to the decision of Cohen LJ in *British Bank For Foreign Trade, Ltd v. Novimex, Ltd* [1949] 1 All ER 155, where his Lordship delivering the judgment of the Court of Appeal agreed with the law as explained by the trial judge in the person of Denning J (as he then was), and this was what Cohen LJ said (see p. 158 of the report):

> I turn next to the main question. Is this an enforceable agreement? A number of authorities have been cited to us, to which I do not propose to refer in detail, because, in my view, the effect of the authorities is correctly stated in the learned judge's judgment where he says:
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> > The principle to be deduced from the cases is that, if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed', or to perform services on terms 'to be agreed', then, although, while the matter is still executory there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied from the conduct of the parties a contract that, in default of agreement, a reasonable sum is to be paid.
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> With that statement of the principle of law I respectfully agree.

A **Here, the available evidence as adduced showed the existence of an executed contract** where the plaintiff had performed its obligations by providing services at the defendant's LIYC and the defendant too had benefited from it. (emphasis added)

B **[39]** Whether or not there is a contract must of necessity be "fact-centric". Here there is no plea of an implied term and there is no necessity of implying one as the parties knew the terms upon which they were proceeding on if an agreement could not be signed. Either party could call it off and neither party would have a claim against the other. It was not a case where the
C defendant stood to reap a benefit at the expense of the plaintiff and had to be compensated for it. I found that based on the minutes of the meeting on 16 November 2009, at pp. 411 - 414 of bundle H, K2 was for all intents and purposes a stand-alone magazine of the plaintiff featuring the defendant in a limited tie-
D back fashion and that the defendant was essentially the 'synergistic distribution channel'. Here was a case where the plaintiff was prepared to proceed with the publication knowing fully well that the publication of K2 could be proceeded with or without the
E association of the defendant or at least the plaintiff was prepared to take that risk. Both parties knew that the losses shall lie where it fell if there was no concluded BCA at the end of the day.

Whether The Plaintiff Was Entitled To Its Claim For Damages In The Residual Costs Or Otherwise

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[40] Having held that there had not been a concluded contract but that the parties had a collaborative arrangement on terms agreed upon with respect to the 15 issues of K2 magazine published, what then is the consequence when the collaborative
G arrangement was terminated on the drop-dead date of 4 March 2011?

[41] The plaintiff took the stand that it could sue based on the termination clauses in the draft BCA which agreement it said it
H was ready for signing on the drop-dead date. The defendant's stand was that as the BCA had not been signed and as there was no concluded agreement to begin with, the plaintiff could not sue for damages for breach.

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[42] To allow the plaintiff to sue based on the BCA not signed would tantamount to the court interfering in the negotiation of the parties to the contract and effectively signing the agreement for the defendant when it could not agree to the terms. That would be setting a dangerous precedent. It would not be out of place to say that the bigger a corporation, more formality is to be expected when one talks of firming a business relationship of some five to eight years.

[43] Even assuming for a moment that there had been a concluded contract in the BCA being signed, the defendant submitted that the plaintiff's claim couched as it is under the unsigned cl. 8.4 under 'Residual Costs' is bad in law.

[44] I agree with learned counsel for the defendant, Mr Saranjit Singh, that cl. 8.4 is only applicable in a case of mutual termination where for payment of the residual costs to the plaintiff by the defendant, the plaintiff would have given up its intellectual property rights in K2 to the defendant. In such a case the defendant is to pay the plaintiff residual costs calculated as follows:

> Residual Costs = The total amount incurred by MMP including all expenses and costs incurred towards the project less MMP's share of profit from the project, if any.

[45] However this is not a case of mutual termination and at any rate, the BCA with this clause on the calculation of residual costs has not been agreed as the parties could not agree on the financials during the negotiation.

[46] Even in a claim for damages arising naturally out of a breach of contract, the plaintiff would still have to prove it. The well known *dicta* of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 which was quoted with approval by His Lordship Thompson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] MLJ 17 at p. 20 is worthy of reproduction below:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it.

[47] See also *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 at p. 648; [1989] 3 MLJ 360 at p. 369 where His Lordship Edgar Joseph Jr J (as he then was) observed:

> In all the circumstances, reason and justice point to the inevitable conclusion that although the plaintiffs had shown the fact of damage, no evidence or no sufficient evidence has been adduced as to its amount with the perhaps unfortunate result that it is virtually impossible to assess damages (see *Dixon v. Deveridge* [1825] 2 C&P 109; 172 ER 50 and *Twyman v. Knowles* 138 ER 1183).

[48] See also *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777.

[49] What the key witness of the plaintiff in PW2 did to 'prove' damage and his claim was merely a bare statement at Q&A 53 of PWS2, his witness statement:

> 53 Q : What did the Plaintiff suffer as a result of the Defendant unilaterally terminating the Agreement?
>
> A : As a result of the Defendant unilaterally terminating the Agreement, the Plaintiff had suffered losses of RM3,158,818 as at 31.07.2011 as stated in the Writ Summons and Statement of Claim.

[50] The relevant part of the plaintiff's claim is set out in para. 10 of the statement of claim below:

MMP COMMUNICATIONS SDN BHD
KUNANG2 FINANCIAL STATEMENT (till July 2011)

	ACTUAL				
	2008	2009	2010	2011 (till July)	TOTAL
REVENUE	RM	RM	RM	RM	RM
Advertising	-	-	84,066	128,556	212,622
Rack Sales	-	-	95,258	(18,082)	77,176
On-board Flight Sales	-	-	333	-	333
Total Revenue	-	-	179,656	110,474	290,130
DIRECT COST					
Printing	-	6,310	321,855	159,120	487,285

Editorial - Salaries	71,827	201,902	274,534	164,837	713,100
Editorial Consultancy Fee	-	20,000	-	-	20,000
Creative - Salaries	-	96,174	106,708	78,583	281,464
Travelling Allowance	-	4,568	16,878	12,300	33,745
Handphone Allowance	-	3,706	11,555	8,200	23,462
Overtime	-	1,200	7,159	5,273	13,632
Travelling		8,782	8,301	2,599	26,351
Expenses Contributors	6,669	4,484	29,625	10,284	44,393
Fee(Content bank)	-	-	959	3,140	4,099
Photoshoot Costs Other Production Cost	-	-	-	314	314
Total Direct Cost	78,496	347,126	777,574	444,650	1,647,846
INDIRECT COST					
Sales & Marketing – Overheads	-	-	145,779	153,487	299,266
The Spirit of Rugby Challenge 2010's Event	-	-	223,700	-	223,700
Distribution Costs	-	-	-	19,578	19,578
Stationery	5,938	28,51	9,246	6,366	24,402
Promotion, Advertising Marketing Cost	-	-	141,046	18,862	159,908
Staff Training	1,275	-	23,183	5,970	30,429
Staff Welfare	-	2,036	9,060	674	11,770
Communications Expenses	3,003	5,169	12,723	6,509	27,404
HR, Finance & Administration Cost (Apportionment to Kunang2)	110,377	233,921	310,064	262,217	916,580
Total Indirect Cost	120,594	243,977	874,801	473,664	1,713,036
Total Profit Loss	(199,090)	(591,104)	(1,472,718)	(807,840)	(3,070,752)

Total	RM(3,070,752)
Profit/Loss	
CAPEX (Direct Charge to Kunang2) – Computers and Softwares	RM(33,066)
Proposed CAPEX in 2011 (Direct Charge to Kunang2)	
Camera	RM(25,000)
Imac	RM(30,000)
TOTAL INVESTMENT	RM(3,158,818)

[51] That I must say fell for short of proof on the balance of probabilities.

Pronouncement

[52] Based on the totality of the evidence I found that the plaintiff had not proved its claim on a balance of probabilities and I therefore had dismissed it with costs.

[53] After hearing parties the court fixed costs at RM45,000 with allocator to be paid before extraction of certificate of costs.